

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

1 JESUS RODRIGUEZ MAGALLON,)
2 Plaintiff,) No. CV-10-3078-JPH
3 v.) ORDER GRANTING DEFENDANT'S
4 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
5 of Social Security,)
6 Defendant.)
7)
8)
9)
10)
11)
12)

13 BEFORE THE COURT are cross-motions for summary judgment noted
14 for hearing without oral argument on December 9, 2011 (ECF No. 13,
15 18). Attorney Thomas A. Bothwell represents Plaintiff; Special
16 Assistant United States Attorney Franco L. Bacia represents the
17 Commissioner of Social Security (Defendant). The parties have
18 consented to proceed before a magistrate judge (ECF No. 6). After
19 reviewing the administrative record and the briefs filed by the
20 parties, the court **GRANTS** Defendant's Motion for Summary Judgment
21 (ECF No. 18) and **DENIES** Plaintiff's Motion for Summary Judgment
22 (ECF No. 13).

23 **JURISDICTION**

24 Plaintiff protectively filed applications for disability
25 insurance benefits (DIB) and supplemental security income (SSI) on
26 March 13, 2007, alleging disability as of September 24, 2006 (Tr.
27 181-187). The applications were denied initially and on
28

1 reconsideration (Tr. 81-84, 86-89).

2 At a hearing before Administrative Law Judge (ALJ) R. J.
 3 Payne on May 18, 2010, plaintiff, represented by counsel, and a
 4 medical expert testified (Tr. 42-66). On May 20, 2010, the ALJ
 5 issued an unfavorable decision (Tr. 17-26). The Appeals Council
 6 denied review on August 24, 2010 (Tr. 1-3). The ALJ's decision
 7 became the final decision of the Commissioner, which is appealable
 8 to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff
 9 filed this action for judicial review on September 17, 2010 (ECF
 10 No. 2, 4).

11 **STATEMENT OF FACTS**

12 The facts have been presented in the administrative hearing
 13 transcript, the ALJ's decision, the briefs of both plaintiff and
 14 the Commissioner, and are briefly summarized as necessary to
 15 understand the court's decision.

16 Plaintiff was 43 years old at onset. He did not attend school
 17 in the United States and grew up in Mexico (Tr. 215). Plaintiff
 18 lives with his spouse and children (Tr. 217). He has worked as a
 19 field worker, and last worked in September 2006 (Tr. 197, 209).
 20 Activities include driving, shopping with rests, and occasionally
 21 cooking (Tr. 219, 220).

22 **SEQUENTIAL EVALUATION PROCESS**

23 The Social Security Act (the Act) defines disability as the
 24 as the "inability to engage in any substantial gainful activity by
 25 reason of any medically determinable physical or mental impairment
 26 which can be expected to result in death or which has lasted or
 27 can be expected to last for a continuous period of not less than
 28 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act

1 also provides that a Plaintiff shall be determined to be under a
2 disability only if any impairments are of such severity that a
3 plaintiff is not only unable to do previous work but cannot,
4 considering plaintiff's age, education and work experiences,
5 engage in any other substantial gainful work which exists in the
6 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
7 Thus, the definition of disability consists of both medical and
8 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
9 (9th Cir. 2001).

10 The Commissioner has established a five-step sequential
11 evaluation process for determining whether a person is disabled.
12 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
13 is engaged in substantial gainful activities. If so, benefits are
14 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
15 the decision maker proceeds to step two, which determines whether
16 plaintiff has a medically severe impairment or combination of
17 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

18 If plaintiff does not have a severe impairment or combination
19 of impairments, the disability claim is denied. If the impairment
20 is severe, the evaluation proceeds to the third step, which
21 compares plaintiff's impairment with a number of listed
22 impairments acknowledged by the Commissioner to be so severe as to
23 preclude substantial gainful activity. 20 C.F.R. §§
24 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
25 App. 1. If the impairment meets or equals one of the listed
26 impairments, plaintiff is conclusively presumed to be disabled.
27 If the impairment is not one conclusively presumed to be
28 disabling, the evaluation proceeds to the fourth step, which

1 determines whether the impairment prevents plaintiff from
 2 performing work which was performed in the past. If a plaintiff is
 3 able to perform previous work, that Plaintiff is deemed not
 4 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
 5 this step, plaintiff's residual functional capacity (RFC)
 6 assessment is considered. If plaintiff cannot perform this work,
 7 the fifth and final step in the process determines whether
 8 plaintiff is able to perform other work in the national economy in
 9 view of plaintiff's residual functional capacity, age, education
 10 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
 11 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

12 The initial burden of proof rests upon plaintiff to establish
 13 a *prima facie* case of entitlement to disability benefits.

14 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
 15 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
 16 met once plaintiff establishes that a physical or mental
 17 impairment prevents the performance of previous work. The burden
 18 then shifts, at step five, to the Commissioner to show that (1)
 19 plaintiff can perform other substantial gainful activity and (2) a
 20 "significant number of jobs exist in the national economy" which
 21 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
 22 Cir. 1984).

23 **STANDARD OF REVIEW**

24 Congress has provided a limited scope of judicial review of a
 25 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
 26 the Commissioner's decision, made through an ALJ, when the
 27 determination is not based on legal error and is supported by
 28 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th

1 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
 2 "The [Commissioner's] determination that a plaintiff is not
 3 disabled will be upheld if the findings of fact are supported by
 4 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
 5 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is
 6 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
 7 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
 8 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
 9 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
 10 573, 576 (9th Cir. 1988). Substantial evidence "means such
 11 evidence as a reasonable mind might accept as adequate to support
 12 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
 13 (citations omitted). "[S]uch inferences and conclusions as the
 14 [Commissioner] may reasonably draw from the evidence" will also be
 15 upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9th Cir. 1965). On
 16 review, the Court considers the record as a whole, not just the
 17 evidence supporting the decision of the Commissioner. *Weetman v.*
 18 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v.*
 19 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

20 It is the role of the trier of fact, not this Court, to
 21 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
 22 evidence supports more than one rational interpretation, the Court
 23 may not substitute its judgment for that of the Commissioner.
 24 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
 25 (9th Cir. 1984). Nevertheless, a decision supported by substantial
 26 evidence will still be set aside if the proper legal standards
 27 were not applied in weighing the evidence and making the decision.
 28 *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432,

1 433 (9th Cir. 1987). Thus, if there is substantial evidence to
 2 support the administrative findings, or if there is conflicting
 3 evidence that will support a finding of either disability or
 4 nondisability, the finding of the Commissioner is conclusive.
 5 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

6 **ALJ'S FINDINGS**

7 The ALJ found plaintiff was insured for DIB purposes through
 8 December 31, 2012 (Tr. 17, 19). At step one, ALJ Payne found
 9 plaintiff did not engage in substantial gainful activity after
 10 onset (Tr. 19). At steps two and three, he found plaintiff suffers
 11 from morbid obesity, hypothyroidism, hypercholesterolemia, asthma,
 12 Bell's palsy, and musculoskeletal pain, impairments that are
 13 severe but do not meet or medically equal a Listed impairment (Tr.
 14 19-20). The ALJ found plaintiff less than completely credible (Tr.
 15 21). At step four, he found plaintiff's RFC for a range of light
 16 work precludes any past relevant work (Tr. 25). At step five,
 17 relying on the Grids, the ALJ found plaintiff was not disabled as
 18 defined by the Act at any time from onset through the decision
 19 date of May 20, 2010 (Tr. 26).

20 **ISSUES**

21 Plaintiff contends the ALJ erred when weighing the medical
 22 evidence, assessing credibility, and relying on the Grids at step
 23 five (ECF No. 14 at 6). The Commissioner responds that the ALJ's
 24 decision is supported by substantial evidence and free of legal
 25 error. He asks the Court to affirm (ECF No. 19 at 2).

26 **DISCUSSION**

27 **A. Credibility**

28 The ALJ found plaintiff less than fully credible. Credibility

1 determinations bear on evaluations of medical evidence when an ALJ
 2 is presented with conflicting medical opinions or inconsistency
 3 between a claimant's subjective complaints and diagnosed
 4 condition. See *Webb v. Barnhart*, 433 F. 3d 683, 688 (9th Cir.
 5 2005).

6 The ALJ relied on contradictory objective medical evidence,
 7 statements indicating "a strong disability conviction rather than
 8 truly disabling impairments," self-reported activities indicating
 9 complaints of disabling limitations are less than credible, and
 10 unexplained noncompliance with medical treatment (Tr. 21-24).

11 Plaintiff alleges the ALJ's reasons are not clear and
 12 convincing (ECF No. 14 at 18). The Commissioner disagrees (ECF No.
 13 19 at 11-13).

14 The Commissioner is correct.

15 Objective medical evidence. The ALJ relied on the opinion of
 16 examining physician Marie Ho, M.D., and of testifying physician
 17 Arthur Lorber, M.D. (Tr. 23-24). Their opinions do not support the
 18 degree of disabling limitation plaintiff alleges. Although an ALJ
 19 may not reject a claimant's subjective complaints based solely on
 20 the lack of medical evidence, it is a factor the ALJ can consider.
 21 *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005), citing
 22 *Bunnell v. Sullivan*, 947 F.2d 341, 345-346 (9th Cir. 1991). Here,
 23 ALJ Payne relied on more than the lack of objective evidence.

24 Disability conviction. On June 13, 2006 [3 months before
 25 onset], plaintiff asked treatment provider Juliet Capp, MSN, ARNP,
 26 if he could be found disabled based on hyperlipidemia and
 27 hypothyroidism. She answered that given his age and medical
 28 problems, he was unlikely to qualify (Tr. 325). On March 9, 2007,

1 plaintiff asked her to endorse disability. She replied that a lot
 2 of people walk around with his conditions (hypothyroidism, knee
 3 pain, asthma, and hyperlipidemia)(Tr. 319). On April 25, 2007, he
 4 again said he wanted to be on disability. Ms. Capp recommended
 5 exercise and weight loss instead (Tr. 309). On May 18, 2007,
 6 plaintiff asked for a "disability paper" (Tr. 307). Two months
 7 before the hearing, at his second appointment with Amra Nasir,
 8 M.D., plaintiff asked Dr. Nasir to speak with Mr. Magallon's
 9 attorney about disability. Dr. Nasir declined (Tr. 435).

10 Activities. During the relevant period of September 24, 2006,
 11 through May 20, 2010, plaintiff traveled by car to Mexico four or
 12 five times, a trip of at least 24 hours. He attended church twice
 13 a week, took his children to school, and attended his daughter's
 14 tennis matches. Plaintiff told treating Dr. Waber he would be
 15 visiting family in California in August 2009 (Tr. 381). It is
 16 well-established that the nature of daily activities may be
 17 considered when evaluating credibility. *Fair v. Bowen*, 885 F.2d
 18 597, 603 (9th Cir. 1989).

19 Noncompliance with medical treatment. The ALJ notes plaintiff
 20 stopped taking thyroid medication for four months and said he did
 21 not remember taking any medication for high cholesterol. According
 22 to treatment provider Coreen Slobig, ARNP, plaintiff was difficult
 23 to treat because he failed to keep appointments and independently
 24 stopped taking prescribed medications (Tr. 386, 438). When Dr.
 25 Nasir suggested plaintiff undergo physical therapy, he declined.
 26 Unexplained noncompliance with medical care casts doubt on a
 27 claimant's subjective complaints. *Fair*, 885 F.2d at 603.

28 The record supports the ALJ's reasons.

1 It is the province of the ALJ to make credibility
 2 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
 3 1995). However, the ALJ's findings must be supported by specific
 4 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
 5 1990). Once the claimant produces medical evidence of an
 6 underlying medical impairment, the ALJ may not discredit testimony
 7 as to the severity of an impairment because it is unsupported by
 8 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
 9 1998). Absent affirmative evidence of malingering, the ALJ's
 10 reasons for rejecting the claimant's testimony must be "clear and
 11 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).
 12 "General findings are insufficient: rather the ALJ must identify
 13 what testimony not credible and what evidence undermines the
 14 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
 15 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

16 The ALJ's reasons for finding plaintiff less than fully
 17 credible are clear, convincing, and fully supported by the record.
 18 See *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002)
 19 (proper factors include inconsistencies in plaintiff's statements,
 20 inconsistencies between statements and conduct, and extent of
 21 daily activities). A documented motivation to secure Social
 22 Security benefits is properly considered when assessing
 23 credibility. See *Matney o/b/o Matney v. Sullivan*, 981 F.2d 1016,
 24 1020 (9th Cir. 1992). Although the evidence supports more than one
 25 rational interpretation, the Court may not substitute its judgment
 26 for that of the Commissioner where, as here, proper legal
 27 standards were applied in weighing the evidence and making the
 28 decision. See *Brawner*, 839 F.2d at 433; *Sprague*, 812 F.2d at 1229-

1 1230.

2 **B. Weighing medical evidence**

3 Plaintiff alleges the ALJ failed to properly credit the
 4 opinions of Drs. Staley, Fuller, and Lopez. He incorrectly
 5 describes them as treating and examining providers (ECF No. 14 at
 6 10-14). Drs. Staley and Fuller are consulting, not treating or
 7 examining, doctors. Dr. Lopez is a doctor who treated plaintiff in
 8 Mexico (Tr. 315-316).

9 Plaintiff alleges the ALJ failed to give enough credit to the
 10 opinions of Drs. Staley and Fuller (ECF No. 14 at 11). Defendant
 11 responds that the ALJ properly gave greater weight to examining
 12 doctor Marie Ho, M.D.'s, opinion (ECF No. 19 at 7-9). The
 13 Commissioner is correct. The opinions of examining doctors are
 14 entitled to greater weight than those of agency reviewing doctors.
 15 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995).

16 The ALJ additionally credited Dr. Lorber's opinion, because
 17 he had the advantage of current x-rays unavailable to Dr. Ho at
 18 the time of her examination.

19 Next, Plaintiff alleges the ALJ failed to properly credit
 20 treating Dr. Lopez's opinion (ECF No. 14 at 122-14). Defendant
 21 responds that the ALJ's reasons for giving it little weight are
 22 sufficient (ECF No. 19 at 9-10).

23 The ALJ discredited Dr. Lopez's contradicted opinion because:
 24 (1) whether he is a medical doctor under Mexico['s] standards is
 25 not verifiable, whereas the qualifications of the other doctors in
 26 the record are verifiable; (2) Dr. Lopez wrote a letter but did
 27 not attach any medical records detailing his findings; (3) if, as
 28 alleged, Dr. Lopez treated plaintiff for three years, supporting

1 medical records should be available; and (4) plaintiff testified
 2 he visited Mexico 4-5 times in the past four years, indicating he
 3 did not see Dr. Lopez regularly (see Tr. 22-23).

4 The ALJ's reasons are specific, legitimate, and supported by
 5 substantial evidence. See e.g., *Bayliss v. Barnhart*, 427 F.3d
 6 1211, 1216 (9th Cir. 2005)(an ALJ may properly reject any medical
 7 opinion that is brief, conclusory, and inadequately supported by
 8 clinical findings). Plaintiff alleges the ALJ should have
 9 contacted Dr. Lopez for further information. This claim fails. The
 10 ALJ's duty is triggered only if a doctor's report is ambiguous or
 11 insufficient for determining disability. *Id.*, at 1217. Neither
 12 situation is presented here.

13 Plaintiff further alleges the ALJ should have credited his
 14 complaints of fatigue. The ALJ correctly observes Dr. Lopez
 15 assessed fatigue associated with plaintiff's thyroid condition
 16 (Tr. 22); however, as noted, the ALJ gave legitimate reasons for
 17 rejecting this opinion, particularly the lack of any supporting
 18 findings. The ALJ was also not required to credit plaintiff's
 19 self-report since he correctly found Mr. Magallon less than fully
 20 credible.

21 **C. Step five**

22 Plaintiff alleges the ALJ erred at step five by failing to
 23 identify specific jobs Mr. Magallon can perform (ECF No. 14 at 18-
 24 20). Defendant responds that the ALJ properly relied on the Grids
 25 at step five (rather than a VE) because plaintiff's assessed
 26 nonexertional limitations do not significantly erode the
 27 occupational base (ECF No. 19 at 13-16, referring to Tr. 25).

28 The Commissioner is correct. See e.g., SSR 83-14 (listing

1 examples of nonexertional limitations or restrictions which have
2 very little or no effect on the unskilled light occupational base,
3 including some assessed by ALJ Payne). See also SSR 96-9p
4 (similar). The Grids do not apply when a claimant suffers *solely*
5 nonexertional impairments; however, Mr. Magallon's assessed RFC
6 includes both exertional and non-exertional limitations.
7 Significantly, plaintiff's assessed nonexertional limitations or
8 restrictions do not significantly erode the unskilled light
9 occupational base. Accordingly, the ALJ properly relied on the
10 Grids (Rule 202.16) when he found plaintiff was not disabled as
11 defined by the Act. When the Grids dictate a finding of "not
12 disabled," the ALJ is not required to specify the jobs a plaintiff
13 is able to perform because the Grids amount to an administrative
14 finding that a significant number of jobs exist.

15 Plaintiff is correct that the ALJ did not schedule a
16 vocational expert to testify at the hearing. However, this fact
17 alone does not indicate that the ALJ had already made a disability
18 determination before the hearing, as plaintiff suggests. Rather,
19 and just as common, the ALJ may have elected to take the lay and
20 medical testimony first, and later schedule a supplemental hearing
21 to take a VE's testimony if needed.

22 The ALJ is responsible for reviewing the evidence and
23 resolving conflicts or ambiguities in testimony. *Magallanes v.*
24 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). It is the role of the
25 trier of fact, not this court, to resolve conflicts in evidence.
26 *Richardson*, 402 U.S. at 400. The court has a limited role in
27 determining whether the ALJ's decision is supported by substantial
28 evidence and may not substitute its own judgment for that of the

1 ALJ, even if it might justifiably have reached a different result
2 upon de novo review. 42 U.S.C. § 405 (g).

3 After review the Court finds no error in the ALJ's step five
4 determination.

CONCLUSION

Having reviewed the record and the ALJ's conclusions, this court finds that the ALJ's decision is free of legal error and supported by substantial evidence.

IT IS ORDERED:

10 1. Defendant's Motion for Summary Judgment (ECF No. 18) is
11 **GRANTED.**

12 2. Plaintiff's Motion for Summary Judgment (Ct. Rec. 13) is
13 **DENIED.**

14 The District Court Executive is directed to file this Order,
15 provide copies to the parties, enter judgment in favor of
16 Defendant, and **CLOSE** the file.

17 DATED this 15th day of November, 2011.